

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CHARLES MESSINA

DECISION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title **T** of the Administrative Code of the City :
of New York for the Year 1978.

Petitioner, Charles Messina, 52 Piedmont Avenue, Staten Island, New York
11530, filed a petition for redetermination of a deficiency or for refund of
New York State personal income tax under Article 22 of the Tax Law and New York
City personal income tax under Chapter-46, Title T of the Administrative Code
of the City of New York for the Year 1975 (File No. 37732).

On October 23, 1985, petitioner waived his right to a hearing and requested
the State Tax Commission to render a decision based on the entire record
contained in the file, with all briefs to be submitted by October 8, 1986.
After due consideration, the State Tax Commission hereby renders the following
decision.

ISSUES

I. Whether the Notice of Deficiency was issued without any basis and for
the sole purpose of extending the period of limitation on assessment.

II. Whether petitioner has substantiated that he was engaged in a trade or
business during the year at issue.

III. Whether petitioner has substantiated the character and amount of
business expenses claimed as deductions from gross income for the year at

FINDINGS OF FACT

1. Petitioner, Charles Messina, together with his wife, Anne Messina, timely filed a New York State and City income tax resident return for 1978, wherein they elected a filing status of "Married filing separately on **one** Return". On his portion of said return, Mr. Messina reported business income **of** \$9,416.00, while on her 'portionof the return Mrs. Nessina reported wages and interest income totalling \$15,385.00. The following table details the manner in which Mr. Messina computed his business income:

<u>Income</u>		
Produce Buying Service	<u>\$11,684.00</u>	
Total Income		\$11,684.00
<u>Expenses</u>		
Courtesies, Coffee, Etc. to Deliverers	\$ 164.00	
Car fares	293.00	
Safety Shoes	180.00	
Gloves	84.00	
Delivery Expenses Absorbed	187 00.	
Over shipments	236.00	
Hospitality	841.00	
Dues	100.00	
Container Deposits Forfeited	<u>183.00</u>	
Total Expenses		<u>2,268.00</u>
Net Income		\$ 9,416.00

2. Attached to petitioner's 1978 return was a wage and tax statement issued to Mr. Messina by Food Fair, Inc. D.I.P., reporting wages, tips and other compensation of \$11,683.73. The statement is stamped with an arrow pointing to the \$11,683.73 figure with the legend "Included in Schedule C".

3. On March 24, 1982, the Audit Division issued a Statement **of** Audit Changes to petitioner Charles Messina and his spouse for the year 1978 which contained the followingexplanation:

"Deductions shown on Schedule C are disallowed since they are not considered ordinary and necessary in the production of **income** as **an**

Your tax liability is recomputed to your best tax advantage.
Household credit disallowed since your total New York income is more than \$25,000.00. "

4. The Audit Division recomputed petitioner's New York State and City income tax liability for 1978 as follows:

	Husband		Wife		
Wages					
			\$11,683.73	\$14,900.56	
Interest income			-0-	484.00	
Total Income			\$11,683.73	\$15,384.56	
Adjustments			-0-	352.00	
Total New York Income			\$11,683.73	\$15,032.56	
Less: Itemized deductions			-0-	3,849.00	
Exemptions			1,300.00	650.00	
Taxable Income			\$10,383.73	\$10,533.56	

	Husband		Wife		
	State	city	State	city	
Tax on Above	\$476.86	\$193.59	\$487.35	\$197.35	
Resident tax credit	-0-	-0-	482.51	-0-	
Balance	\$47.66	\$193.59	\$ 4.84	\$197.35	
Tax previously stated	309.46	138.67	-0-	197.35	
ADDITIONAL, TAX DUE	\$167.40	\$ 54.92	\$ 4.84	\$ -0-	\$227.16

5. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 14, 1982, issued a Notice of Deficiency to petitioner for 1978, asserting additional New York State and City tax due of \$222.32 as indicated above, plus interest.

6. Petitioner's tax return was selected for examination along with those of approximately 100 other individuals on the basis that the returns had been prepared by a particular accountant. An investigation had disclosed that said accountant had consistently prepared returns on which an individual with wage or salary income shown on wage and tax statements had reported said income as business receipts on Federal Schedule C. Department of Taxation and Finance auditors were directed to review the returns and to disallow claimed business expense deductions if the taxpayer appeared to be an employee receiving wage or

salary income reported on wage and tax statements. Petitioner Charles Messina's claimed Schedule C deductions were disallowed on that basis.

7. Petitioner submitted documentary evidence in the form of an affidavit and worksheets in substantiation of the business expenses claimed on his Federal Schedule C. However, the evidence submitted did not relate to a characterization of the expenses as business rather than personal.

8. Petitioner contends:

(a) that the Notice of Deficiency was issued on an arbitrary and capricious basis just prior to the expiration of the period of limitations on assessment, thus depriving petitioner of the opportunity to present substantiation for the claimed deductions;

(b) that petitioner was one of a large group of taxpayers who were selected for special scrutiny because their returns had been prepared by the same tax preparer; and

(c) that where petitioner did not have cancelled checks or other receipts for certain expenses, the Department of Taxation and Finance should allow petitioner a reasonable estimate of such expenses.

CONCLUSIONS OF LAW

A That the Notice of Deficiency was properly issued and was not arbitrary and capricious. The return was patently erroneous and the Audit Division was justified in disallowing the business expenses claimed by petitioner on his Federal Schedule C. The Notice of Deficiency was preceded by a Statement of Audit Changes and petitioner had an opportunity to file an amended return claiming employee business expenses as adjustments to income on Federal Form 2106, or as itemized miscellaneous deductions, but did not do so.

B. That the fact that petitioner's return was selected for examination because of certain practices of **his** accountant **is** irrelevant. Petitioner's liability depends solely **on** the facts adduced herein.


C. That petitioner has failed to sustain **his** burden of proof (Tax Law § 689[e]; Administrative Code § T46-189.0[e]) to show **(i)** that Charles Messina was engaged in a trade or business other than as an employee (Internal Revenue Code § 62[1]); **(ii)** that the expenses in question were trade or business deductions **of** an employee, deductible pursuant to Internal Revenue Code § 62(2); and **(iii)** that the expenses in question were ordinary and necessary business expenses, deductible under Internal Revenue Code § 162(a).

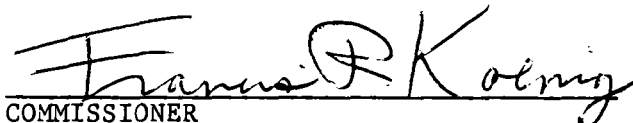
D. That the petition **of** Charles Messina **is** denied and the Notice of Deficiency dated April 14, 1982 is sustained in full, together with such additional interest as may be lawfully due and owing.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987


PRESIDENT


COMMISSIONER


COMMISSIONER